

Federal Communications Commission
Washington, D.C. 20554

December 7, 2001

In reply refer to:
1800B3-HM

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1300 North 17th Street
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Re: KBJD(AM), Denver, Colorado
Facility ID #87151
File No. BL-20000105AAQ
Petition for Reconsideration

Dear Counsel:

We have under consideration two pleadings from Salem Media of Colorado, Inc. ("Salem") concerning a license granted on February 20, 2001 for AM expanded band station KBJD(AM), Denver, Colorado.¹ On March 22, 2001 Salem filed a notification of its rejection of the above-referenced license application. That pleading was filed pursuant to Section 1.110 of the Commission's rules which provides that an applicant may object to the grant of a license that contains conditions other than those requested, by filing a written request rejecting the grant within 30 days of the grant. 47 C.F.R. § 1.110. Second, on March 23, 2001 Salem filed a petition for reconsideration of the licensing decision. For the reasons discussed below, we grant the petition for reconsideration, reissue a license with a corrected condition, and dismiss as moot Salem's Section 1.110 filing.

Pleadings: Salem asserts that the staff placed an erroneously conditioned KBJD(AM) license with respect to the length of the transition period during which it may operate both KBJD(AM) and KRKS(AM). The license states that "after the five-year period starting from the date the *construction permit* of the [expanded band] facility specified herein is issued," (emphasis added), the licensee must surrender either the KRKS(AM) or KBJD(AM) license. Salem argues that the license condition is contrary to the policies enunciated in the AM expanded band rule making proceeding and should be corrected to state that, "after the five-year period starting from the date the expanded band facility specified herein is *licensed*," (emphasis added), the licensee must surrender either its existing license or the expanded band license. Salem notes that KBJD's original permit and modified permit both contained conditions based on the license date, rather than the permit date. Salem argues further that the change in condition may cause it to surrender the expanded band license because it would have only two years rather than the anticipated five years to transition the existing station's audience and advertisers to the expanded band station.

Additionally, Salem asserts that 47 C.F.R. § 73.3555 Note 10, which provides an exception to the Commission's multiple ownership rules, incorrectly codifies the five-year transition period, by stating that authority for joint ownership of the expanded band and existing stations will expire "on the fifth anniversary for

¹ Salem also is licensee of associated existing band station KRKS(AM), Denver, Colorado.

the date of issuance of a construction permit” for an expanded band station. Alternatively, Salem argues that if Note 10 correctly codifies the five-year transition period, then it only applies to permittees who exceed the ownership cap under Section 73.3555. Based on this reading, Salem argues that because it does not own stations in excess of the ownership limits of Section 73.3555, that it should not be required to divest KBJD five years after the expanded band permit is granted.

Discussion: Our review of the history of the AM expanded band confirms that the five-year transition period for dual operation should run from the date of license rather than from the date of permit. In 1991, as part of an omnibus rule making proceeding to revitalize AM service and to reduce congestion and interference to the existing band, the Commission adopted a five-year period for eligible AM licensees to broadcast in and potentially transition to the AM expanded band. See *Review of the Technical Assignment Criteria for the AM Broadcast Service, Report and Order*, MM Docket No. 87-267, 6 FCC Rcd 6273 (1991) (“1991 R&O”), *recon. granted in part and denied in part*, 8 FCC Rcd 3250 (1993) (“First Recon. Order”). The Commission’s statement that, “temporary dual ownership and operational flexibility [of the existing and expanded band stations] are essential to a successful transition to the expanded band” supports starting the five-year dual operating authority period with the licensing of the expanded band station. 1991 R&O, 6 FCC Rcd at 6320. The Commission appeared to explicitly identify this approach in the earlier *Notice of Proposed Rule Making*. “Once a station is *licensed* to operate in the expanded band and the transition period has expired, the existing band station would go silent” *Review of the Technical Assignment Criteria for the AM Broadcast Service, Notice of Proposed Rule Making*, 5 FCC Rcd 4381, 4392 (1990) (emphasis added).

Furthermore, we conclude that the use of the permit date, in the notes to the rules, pertains only to numerical ownership limits. In the 1991 R&O, the Commission adopted an exception to the duopoly and national ownership rules which allowed the numerical limits to be exceeded during this transitional phase. The exception was codified as notes 9 and 10 to 47 C.F.R. § 73.3555² and provided that “[a]uthority for joint ownership” of overlapping existing and expanded band stations “will expire . . . on the fifth anniversary for the date of issuance of a construction permit for an AM radio station in the 1605-1705 kHz [expanded] band.” 47 C.F.R. § 73.3555 Note 10. Notes 9 and 10 are only relevant within the context of the multiple ownership rules. The duopoly and national ownership restrictions have been greatly relaxed over the years with the restrictions on national radio ownership limits eventually eliminated through the passage of the 1996 Telecommunications Act.³ The notes left intact since 1991, only affect a licensee that is for people who might temporarily exceed the local radio ownership limits as a result of its ownership of an expanded band station.

Several additional reasons support our conclusion that the dual operating period should be measured from the grant of an expanded band station license. The 1991 R&O established expanded band licensing

² Note 9 to Section 73.3555 provides that the radio contour overlap rule will not apply to an application for an expanded band station whose 5 mV/m groundwave contour overlaps that of the licensee’s existing AM station. Note 10 states: “Authority for joint ownership [of expanded and existing band AMs] granted pursuant to Note 9 will expire at 3 a.m. local time on the fifth anniversary for the date of issuance of a construction permit for an AM radio station in the 1605-1705 kHz [expanded] band.”

³ See *Implementation of Sections 202(a) and 202(b)(91) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

procedures. Among other things, this order announced that applications for construction permits would be accepted only after the allotment plan became final. The Commission modified this procedure in 1997:

Previously, we announced that applications for construction permits for Expanded Band stations would not be requested until the revised allotment plan becomes a final Commission action [*i.e.*, no longer subject to administrative or judicial review]. We now conclude that the public interest would be better served by calling for the filing of construction permit applications within ninety days of the release of Public Notice III.

See Implementation of the AM Expanded Band Allotment Plan, MM Docket No. 87-267, 12 FCC Rcd 3361, 3369 (1997) (“1997 Order III”).⁴ Based on the changes adopted in the *1997 Order III*, the Mass Media Bureau concurrently released the Third Allotment Plan in *Public Notice III* that listed the 88 stations eligible to apply for expanded band authorizations and their specific allotments. *See Public Notice, Mass Media Bureau Announces Revised AM expanded band Allotment Plan and Filing Window for Eligible Stations*, 12 FCC Rcd 3185 (MMB 1997) (“*Public Notice III*”). Salem received its construction permit for station KBJD pursuant to that plan.

The decision to issue permits prior to finality in this proceeding could severely limit the ability of certain expanded band stations to take advantage fully of dual frequency operations. Upon grant of the construction permit applications in 1997 and 1998, each expanded band permittee had the option of constructing at its own risk absent finality in the rule making proceeding.⁵ Alternatively, permittees could properly delay construction and toll their construction deadlines under our rules, but could not stop the running of the five-year dual operating authority condition. Accordingly, such an interpretation could delay the migration of stations to the AM expanded band.

Finally, it appears in *Public Notice III*, that the Bureau understood the Commission’s intent that the five-year transition period for dual operation would commence with the grant of the expanded band license rather than its construction permit. The Bureau stated that: “[f]ollowing grant of a construction permit application and construction of the authorized facilities, each expanded band permittee will be required to file an application for covering license on FCC Form 302. Expanded band *licensees* will receive authorizations permitting dual frequency operations for a period not to exceed five years” (emphasis added).”

Accordingly, IT IS ORDERED that Salem Media of Colorado, Inc.’s petition for reconsideration

⁴ *See Implementation of the AM Expanded Band Allotment Plan*, MM Docket No. 87-267, 13 FCC Rcd 21872 (1998) (“*Order III Recon.*”); *appeal of 1997 Order III*, 12 FCC Rcd 3361 (1997) docketed sub nom. *Sunrise Broadcasting of New York, Inc. v. FCC*, No. 97-1412 (D.C. Cir. June 25, 1997); *FCC motion for remand of the record granted without hearing* No. 97-1412, 1998 WL 202138 (D.C. Cir. Mar. 6, 1998) on remand 15 FCC Rcd 17018 (2000).

⁵ *See Rainbow Broadcasting Co.*, 12 FCC Rcd 4028 (1997) quoting *Channel 16 of Rhode Island v. FCC*, 440 F.2d 266, 275-276 (D.C. Cir. 1970) (“it is unfair and unreasonable to require construction while relevant FCC policy remains in limbo.”)

IS GRANTED to the extent indicated herein and IT IS FURTHER ORDERED that the February 20, 2001 grant of license for expanded band station KBJD(AM), Denver, Colorado (File No. BL-20000105AAQ) SHALL BE REISSUED under separate cover with the CORRECTED condition that, "Pursuant to MM Docket No. 87-267, after the five-year period starting from the date the [expanded band] facility specified herein is licensed, licensee will surrender either its existing band license or the expanded band license." IT IS FURTHER ORDERED that Salem Media of Colorado, Inc.'s Section 1.110 filing IS DISMISSED as moot.

Sincerely,

Peter H. Doyle, Chief
Audio Services Division
Mass Media Bureau